No. 93-5256

In The

# Supreme Court of the United States

October Term, 1993

FREDEL WILLIAMSON,

*Petitioner,*

vs.

UNITED STATES OF AMERICA,

*Respondent.*

**On Writ Of Certiorari**
**To The United States Court Of Appeals**
**for The Eleventh Circuit**

## REPLY BRIEF FOR PETITIONER

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## QUESTIONS PRESENTED

I. Whether a post-arrest confession by an accomplice implicating a defendant, offered as an admission against penal interest of an unavailable declarant under Federal Rule of Evidence 804(b)(3), bears adequate indicia of reliability to render it admissible under Rule 804(b)(3) and the Sixth Amendment Confrontation Clause?

II. Whether a post-arrest confession by an accomplice implicating a defendant, offered as an admission against penal interest of an unavailable declarant under Federal Rule of Evidence 804(b)(3), constitutes a firmly rooted hearsay exception rendering it presumptively reliable and not subject to further analysis under the Sixth Amendment Confrontation Clause?

III. Whether 804(b)(3)'s requirement that a statement must be corroborated by circumstances clearly indicating its trustworthiness, is subject to the further requirement of *Idaho v. Wright*, 497 U.S. 805 (1990), that the only circumstances that can be considered are those surrounding the making of the statement?

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### I. A POST-ARREST CONFESSION OF AN UNAVAILABLE ALLEGED ACCOMPLICE WHICH INCRIMINATES A CRIMINAL DEFENDANT AND WAS ELICITED THROUGH CUSTODIAL INTERROGATION IS INHERENTLY UNRELIABLE AND ITS INTRODUCTION INTO EVIDENCE AT THE DEFENDANT'S SEPARATE TRIAL NECESSARILY VIOLATES THE SIXTH AMENDMENT.

The government argues that "[t]here is nothing in the text or history of Rule 804(b)(3) that requires the categorical exclusion of [custodial confessions of accomplices which incriminate criminal defendants]." Gov.Br. 10. The government is wrong. As Petitioner pointed out in his initial brief, early drafts of the rule excluded statements or confessions offered against an accused in a criminal case, made by a codefendant or other person implicating both himself and the accused. H.R.REP.NO. 650, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 7075, 7087. This exclusion was eliminated later only because it was deemed unnecessary to codify prevailing constitutional evidentiary principles. S.REP.NO. 1277, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 7051, 7068. Pet.Br. 17-18. Thus, the history of the rule supports a categorical exclusion.

More importantly, the history and function of the Confrontation Clause and the courts' experience in considering this type of statement strongly support a per se rule of exclusion. Although the government recognizes that this Court has consistently expressed grave doubt about the trustworthiness of these statements and has, consequently, repeatedly excluded them, Pet.Br. 31, it argues that because this Court, until now, has never held that these statements are per se inadmissible, it should not do so now. Gov.Br. 13. This Court's uniform experience with and treatment of these statements now warrant

such a rule. Even cases which have ultimately admitted statements falling within this category have recognized them to be uniquely and especially suspect. The courts have identified the various factors – made in the coercive setting of police custody, in response to interrogation, under circumstances in which the declarant has a strong incentive to shift or spread blame, curry favor, avenge himself, or divert attention to another, not under oath – which, in accordance with human experience, dramatically undermine the trustworthiness of these statements. As this Court stated in *Roberts v. Russell*, 392 U.S. 293, 295 (1968), which held that the rule of *Bruton* is to be applied retroactively, "the constitutional error [of allowing the factfinder to consider such a statement] presents a serious risk that the issue of guilt or innocence may not have been reliably determined." These statements are typically the linchpin to the government's case. Permitting the lower courts the discretion to admit these statements presents an unreasonable risk that a defendant will be convicted based on untrustworthy hearsay.

By permitting the courts to admit these inherently untrustworthy hearsay statements, a defendant's right to confront the declarant and demonstrate his lack of credibility is forfeited when his need for that right is paramount. This Court has held that a defendant's confrontation rights are violated when, though some cross-examination is permitted, it is restricted to such a degree as to deprive the defendant an adequate opportunity to fully develop a defense or demonstrate bias. *E.g., Olden v. Kentucky*, 488 U.S. 227 (1988); *Delaware v. Van Arsdall*, 475 U.S. 673, 678-80 (1986); *Davis v. Alaska*, 415 U.S. 308, 315-18 (1974). This Court has held that the mere denial of a face-to-face confrontation of the witness against a defendant, even where cross-examination is fully afforded, may violate the Confrontation Clause. *Coy v. Iowa*, 487 U.S. 1012 (1988). In our situation, where admission of the declarant's hearsay statement would



result in a denial of *all* cross-examination regarding the most important witness, a per se rule of exclusion is demanded.

A per se rule of exclusion is warranted because post-arrest confessions of accomplices which implicate defendants categorically fail to satisfy the rationale underlying the declaration against penal interest exception. In the case *People v. Watkins*, 438 Mich. 627, 475 N.W.2d 727 (1991), *cert. denied*, 112 S. Ct. 933 (1992), Chief Justice Cavanagh of the Michigan Supreme Court explored this hybrid issue.[1] Chief Justice Cavanagh defined the "carry-over" rule and its rationale as follows:

> [D]iscrete assertions within a broader statement are viewed as against interest and therefore admissible – even though they, specifically, are *not* in fact against the interest of the declarant, and may even *favor* the interest of the declarant – on the theory that the trustworthiness of *other* assertions within the broader statement (which *are* concededly against the declarant's interest) "carries over" and permeates the entire statement with a sort of aura of trustworthiness.

*Id.* at 633-34 (emphasis in original). Chief Justice Cavanagh noted that Dean Wigmore's treatise appears to

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[1] *Amicus* Wayne County, Michigan, apparently overlooked *Watkins*. Instead it cites *People v. Poole*, 444 Mich. 151, 506 N.W.2d 505 (1993), *amicus* at 45-46, in which the court held that the declarant's statements were admissible against the defendant. The court in *Poole* specifically distinguished *Watkins* because unlike the custodial statements made in response to police interrogation in *Watkins*, *id.*, 438 Mich. at 706, the statements in *Poole* were spontaneously made to a non-agent acquaintance. Any reasonable assessment of the portion of Harris's statement implicating Williamson against the factors identified in *Poole*, *amicus* at 45-46, compels a conclusion that Harris's statement, and any similar statement, would *not* satisfy the Confrontation Clause.

support this rule. *Id.* at 634 (quoting 5 J. WIGMORE, EVIDENCE § 1465 at 339 (Chadbourn rev. 1974)). Wigmore reasoned that these other statements are admissible because they were made "while the declarant was in the trustworthy condition of mind which permitted him to state what was against his interest." *Id.* at 635 (quoting WIGMORE at 341)). Chief Justice Cavanagh went on to point out that this is not the rationale which arguably renders a statement against interest trustworthy. Instead, "as Wigmore himself states, '[t]he basis of the exception is the principle of experience that a statement asserting a fact distinctly against one's interest is unlikely to be deliberately false or heedlessly incorrect. . . . ' *Id.*, § 1457, p. 329." *Id.* Thus, "[s]uch a statement . . . has a guarantee of trustworthiness only insofar as the truth-telling stimulus of the declarant is operative; that is only insofar as the statement *or portions of the statement*, is against the declarant's interest." *Id.* at 636 (quotation omitted). As Chief Justice Cavanagh further explained:

> It would defy logic and common sense, however, to suppose that the motive for truthfulness presumed to underlie a discrete, specific assertion against interest possesses any such permeating influence, or could somehow cloak all collateral assertions with an equivalent aura of reliability. The presumed trustworthiness of a statement against interest derives not from the circumstances in which the statement is made, or from the general mental condition of the declarant, but only from the specific factual character of the statement itself. The statement is trustworthy *precisely*, and *only*, to the extent that it is, in fact, against the interests of the declarant.

*Id.* at 637-38 (footnote omitted).[2]

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[2] Chief Justice Cavanagh went on to demonstrate how Wigmore, himself, in several passages of his treatise, appears to have rejected the rationale underlying the supposed carry-over rule. *Id.* at 638.



The rationale underlying Chief Justice Cavanagh's opinion is compelling. As he points out, "[t]he caselaw rejecting the carry-over rule is both ample and persuasive." *Id.* at 639. The rule has been persuasively rejected by state courts, *e.g.*, *People v. Leach*, 15 Cal.3d 419, 441, 124 Cal.Rptr. 752, 541 P.2d 296, 308-11 (1975), *cert. denied*, 424 U.S. 916 (1976)[3]; *State v. Allen*, 139 N.J.Super. 285, 288, 353 A.2d 546, 548 (1976); *State v. Self*, 88 N.M. 37, 536 P.2d 1093, 1097-98 (1975); *People v. Brensic*, 70 N.Y.2d 9, 15-16, 517 N.Y.S.2d 120, 509 N.E.2d 1226, 1228-29 (1987) (where statement offered to incriminate defendant, penal interest compromised must be "of sufficient magnitude or consequence to the declarant to all but rule out any motive to falsify"), and federal courts. *E.g. United States v. Flores*, 985 F.2d 770, 780-83 (5th Cir. 1993); *United States v. Sarmiento-Perez*, 633 F.2d 1092, 1101-02 (5th Cir. 1981); *United States v. Lilley*, 581 F.2d 182, 188 (8th Cir. 1978); *see, e.g.*, *United States v. Riley*, 657 F.2d 1377, 1384-85 (8th Cir. 1981), *cert. denied*, 459 U.S. 111 (1983); *United States v. Palumbo*, 639 F.2d 123, 127-28 (3d Cir. 1981); *United States v. Bailey*, 581 F.2d 341, 345-46 n. 4 (3d Cir. 1978). Moreover, both Judge Weinstein and Dean McCormick, in their treatises, have taken "an almost absolute position against the admission of inculpatory hearsay statements in accomplice confessions." *Id.* at 643-44 (quoting 4 J. WEINSTEIN AND M. BERGER, WEINSTEIN'S EVIDENCE ¶ 804(b)(3)[03] at 804-150 (1990)), 645 (quoting E. CLEARY, MCCORMICK ON

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[3] The case *People v. Gorden*, 50 Cal.3d 1223, 270 Cal. Rptr. 451, 792 P.2d 251 (1990), *cert. denied*, 499 U.S. 913 (1991), cited by the government, Gov.Br. 12, 28, appears to be wrongly decided. It can neither be squared with California's rejection of the carry-over rule in *Leach* nor the reasoning and rule of this Court's in *Lee*.

EVIDENCE § 279 at 825-26 (3d ed. 1984)). Numerous commentators have criticized the approach of the carry over rule.[4] Finally, as Chief Justice Cavanagh noted, it would appear that this Court, too, has rejected it. *Lee v. Illinois*, 476 U.S. 530, 545, 106 S.Ct. 2056, 2064 (1986). To the extent there is any doubt, this Court should conclusively reject this poorly reasoned, unconstitutional rule today.

The government argues that the portions of Harris's statements that inculpated Petitioner were properly admitted along with the portions that inculpated Harris. Gov.Br. 23-24. Its reliance on the Advisory Committee Notes to Rule 804 is misplaced. The Advisory Committee Notes' reference to the potential admissibility of third party confessions implicating a defendant is qualified later in the same note to indicate that a statement such as Harris's, "admitting guilt and implicating another person, made while in custody," and likely motivated by a desire to curry favor with the authorities, should be excluded.

The government cites 2 MCCORMICK ON EVIDENCE § 319 at 345 (J. Strong 4th ed. 1992) for the proposition: "When the statement incriminates both the declarant and the accused and is offered by the prosecution against the accused . . . the trend in the federal courts is to admit the

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[4] *See, e.g.*, Beaver and McCleary, *Inculpatory Statements Against Penal Interest: State v. Paris Goes Too Far*, 8 U of Puget Sound L.Rev. 25 (1984); Bergeisn, *Federal Rule of Evidence and Inculpatory Statements Against Penal Interest*, 66 Calif.L.Rev. 1189, 1207-17 (1978); Davenport, *The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis*, 85 Harv.L.Rev. 1378, 1394-98 (1972); Note, *Inculpatory Declarations Against Penal Interest and the Co-conspirator Rule Under the Federal Rules of Evidence*, 56 Ind.L.J. 151, 168-71 (1980); Note, *Inculpatory Statements Against Penal Interest and the Confrontation Clause*, 83 Colum.L.Rev. 159, 163-64 (1983); Jefferson, *Declaration Against Interest: An Exception to the Hearsay Rule*, 58 Harv.L.Rev. 1, 60, 62-63 (1944).



entire statement if the two parts are reasonably closely connected." Gov.Br. 24. This passage is clarified later in the section where it indicates that courts attach particular significance to the fact that a declarant was in custody at the time of the statement in determining admissibility: "While courts generally do not accord conclusive effect to the fact of custody, great weight is attributed to it." *Id.* at 346. *Accord* E. CLEARY, MCCORMICK ON EVIDENCE § 279 at 825-26 (3d ed. 1984); E. CLEARY, MCCORMICK ON EVIDENCE § 279 at 677 (2d ed. 1972). This is similar to the limitation on the admissibility of co-conspirator statements to the duration of the conspiracy. Once the conspiracy is terminated through arrest, or otherwise, other interests and motivations come into play which taint post-conspiratorial assertions. *See Krulewitch v. United States*, 336 U.S. 440 (1949).

None of the cases cited by the government suggest that custodial statements made under the circumstances of Harris's statements would be admissible. In *United States v. Lieberman*, 637 F.2d 95 (2d Cir. 1980), the statement at issue, which incriminated both the declarant and the defendant, was made to a co-conspirator. *Id.* at 102. The court specifically contrasted the statement with one made to a known government agent tending to relieve the declarant of criminal liability which is not against the declarant's interest. *See id.* at 103. In *United States v. Barrett*, 539 F.2d 244 (1st Cir. 1976), the court was concerned with the distinguishable situation of a defendant offering a declarant's statement for *exculpatory* reasons. *Id.* at 249. In holding the statement admissible, the court relied in part on the fact that the declarant's statement was made spontaneously to a close acquaintance. *Id.* at 251. The court acknowledged the scholarly commentary which has criticized admission of inculpatory portions of a statement by virtue of its relationship to self-incriminating portions. *Id.* at 252. Ultimately, because the issue concerned the district court's exclusion of testimony

offered by the defendant, it did not need to concern itself with the Confrontation Clause issue presented instanter. Similarly, *United States v. Casamento*, 887 F.2d 1141 (2d Cir. 1989), *cert. denied*, 493 U.S. 1081 (1990), unlike the instant case, appears to have concerned a spontaneous statement made to a perceived confederate, not a custodial statement made to a known government agent. *Id.* at 1169. Thus, none of these authorities undermine the per se rule of exclusion which Petitioner seeks today.

## II. HARRIS'S POST-ARREST STATEMENTS IMPLICATING WILLIAMSON DID NOT MEET THE REASONABLE PERSON STANDARD OF RULE 804(B)(3) OR OTHERWISE BEAR ADEQUATE INDICIA OF RELIABILITY TO RENDER THEM ADMISSIBLE UNDER THE SIXTH AMENDMENT CONFRONTATION CLAUSE.

Relying on its argument that the hearsay exception contained in Rule 804(b)(3) is "firmly rooted," the government argues that the Confrontation Clause does not require corroboration of a statement against interest. Gov.Br. 35. The Petitioner maintains that the hearsay exception contained in this rule is *not* firmly rooted. Argument III, *infra*. In the alternative, the government argues that any statement that qualifies for admission under Rule 804(b)(3) necessarily bears adequate indicia of reliability. This is not true. Several cases have concluded that while a declarant's inculpatory statements met the Rule's requirement that they so far tended to subject the declarant to criminal liability that a reasonable person would not have made them unless believing them to be true, they, nonetheless, excluded the statements upon determining they failed to bear adequate indicia of reliability to justify dispensing with cross-examination. *See, e.g., United States v. Boyce*, 849 F.2d 833, 836-37 (3d Cir. 1988); *United States v. Alvarez*, 584 F.2d 694, 699-702 (5th Cir. 1978). To the extent that a district court's finding



under Rule 804(b)(3) that a statement is one no reasonable person would make unless believing it to be true establishes *ipso facto* adequate indicia of reliability to satisfy Confrontation Clause concerns, Harris's statement failed to meet the test under the Rule.

The government's speculation about Harris's motivation for making his statements and the manner in which the surrounding circumstances impacted on their trustworthiness highlights the essential nature of cross-examination in these circumstances. The government's entire case rested upon the strength of Harris's presumptively untrustworthy statements. No argument for harmless error has been raised; none could be credibly advanced. Only under the close scrutiny of rigorous cross-examination could the trustworthiness of Harris's statement be fairly evaluated.

The government asserts that the district court found Harris's statements were "against his penal interest within the meaning of Rule 804(b)(3). . . . " Gov.Br. 20. Particularly in light of the tremendous weight the government places upon the distinction between a simple "statement against penal interest" and one which a reasonable person would not make unless believing it to be true, *see* Gov.Br. 32-33 n. 21, 35-36, this assertion is unsupported. At the place in the record indicated by the government, J.A. 51-52, the district judge simply stated, "First, defendant Harris's statements clearly implicated himself, and therefore, are against his penal interest." The court never once stated, or indicated it had considered, whether Harris's statements were ones a reasonable person would not have made unless believing them to be true. *See* J.A. 31, 35-36, 51-52. Contrary to the government's argument, Harris's statements were self-serving and never could have satisfied the reasonable person standard under Rule 804(b)(3).

The government speculates that contrary to Petitioner's assertion that Harris gave up little by confirming

knowledge that he was couriering drugs, Harris gave up much. The government's speculation is unsound. If Harris truly believed the police had a long way to go to prove his *knowing* possession of the drugs, why would he have admitted his knowledge? Instead, a reasonable person who is caught red handed and is arrested for driving a rental vehicle containing 19 kilograms of cocaine believes that the question of guilt is fait accompli. This perception mirrors the decisions of our courts which routinely convict defendants like Harris on the strength of an *inference* that there was knowing possession of the contraband. Thus, the portion of Harris's statements indicating his knowledge of the contraband only comprised his penal interests marginally.

The government argues Harris did nothing to "minimize his role in the offense and shift blame to Petitioner. . . . " Gov.Br. 20. The record belies this assertion. As stated in the Petitioner's Brief, Harris repeatedly emphasized he was nothing more than a courier. J.A. 37, 38-40. By contrast, he stated initially that the cocaine belonged to Williamson, J.A. 37, explained later that he received the cocaine from an acquaintance of Williamson, J.A. 39, and ultimately stated that Williamson arranged for the acquisition and transportation of the cocaine and was its intended recipient. J.A. 40-41. He never stated that he jointly planned the illegal mission with Williamson or would share in its proceeds. In all of his statements, Harris carefully maintained that he was merely following Williamson's (or Williamson's acquaintance's) directions. Reasonable persons believe that mere couriers are treated less harshly than persons who manage narcotics trafficking operations. Again, this perception certainly mirrors federal narcotics laws and the experience in our courts. *Cf.* U.S.S.G. § 2D1.1, Application Note 16 (downward departure warranted where offense level based on narcotics quantity over-represents defendants culpability and defendant qualifies for mitigating



role adjustment under section 3B1.2); § 3B1.2 and Application Notes (two to four level reduction in offense level for minor or minimal participants including off loaders and couriers).

The government's assertion that "[t]here is no suggestion in the record that Harris had any motive or desire to implicate Petitioner falsely," Gov.Br. 21, is not credible. Even without being told that any cooperation would be reported to the prosecutor, a reasonable person arrested for committing a narcotics offense knows well that the ticket to leniency regarding the charges that will be filed and the sentence that will be sought is to identify a bigger fish in the pond. Once again, the rules and experience of the courts validate this perception. *See* Fed.R.Crim.P. 35(b); 18 U.S.C. § 3553(e). If there were any doubt in Harris's mind about this protocol, Agents Steffens and Walton removed the doubt. J.A. 25-26 (Steffens told Harris "that if he wished to cooperate, . . . he would be put in touch with . . . a[n] . . . agent or assistant United States attorney who could explain . . . what cooperation meant and what in turn he might receive to his benefit for that . . . ").

The government's explanation of Harris's reluctance to give recorded or sworn statements is far-fetched. Of course, once Harris made his oral statement implicating Williamson he could have had no doubt that Williamson would learn of his accusation. It would obviously make little difference to Williamson's reaction whether the statement was oral, recorded, written, or sworn. On the other hand, if the statements Harris had made were false, it would make a big difference to him if they were recorded, written, or sworn. Harris would have a difficult time denying any statements if they were recorded or written. Indeed, he may well have thought that some criminal penalty would have attached to a recorded or written false statement that did not attach to a false oral statement. Moreover, Harris was certainly aware that a

false statement under oath could result in criminal prosecution and sanctions. Clearly, his refusal to implicate Williamson under oath, after having given three oral statements implicating him, most reasonably reflects his own lack of confidence in the truth of the statements he made.

The government finally speculates that, upon being faced with the specter of being caught in a falsehood (the story about delivering the cocaine to the dumpster), Harris admitted the truth and identified Williamson as the recipient of the cocaine. Gov.Br. 21-22. The government argues that Harris could not bear the compulsion of the government proceeding to the Atlanta dumpster and coming up empty handed. According to the government, a reasonable person would not have made this statement unless believing it to be true. Contrary to the government's argument, Harris had nothing to lose if the agents proceeded to any dumpster he might have identified and came back empty handed. Numerous circumstances in the underworld of narcotics trafficking could have explained the foiled delivery other than the falsity of Harris's initial statement. Contrary to the government's assertion that Harris "had no other practical choice," Gov.Br. 22, other than to implicate Williamson as the recipient, Harris very easily could have explained any failed attempted delivery as the result of other known (or unknown) extenuating circumstances.

Another scenario readily comes to mind. It may well have been that Harris's statement about the Cuban man in Ft. Lauderdale and the delivery to the Atlanta dumpster was true. However, upon realizing that the agents intended to conduct a controlled delivery and that the actual intended recipient would be arrested, Harris's fear of that individual's retaliation prompted him to change the story and falsely implicate Williamson.

The government's attempt to distinguish *Lee v. Illinois* factually is unavailing. Indeed, a comparison of the



nature of the confession in *Lee*, which was insufficient to persuade the majority of its trustworthiness to justify dispensing with cross-examination, to Harris's statements demonstrates that the inculpatory portions of Lee's co-defendant's confession were far more trustworthy than the similar portions of Harris's statements. In *Lee*, the petitioner and co-defendant Thomas were charged with and convicted of committing a double murder. Thomas' confession detailed how he and the petitioner had jointly planned the murder of petitioner's aunt and had then jointly executed both her murder and the murder of her friend. Thomas's written, signed statement was relayed in the first person plural voice: "We had planned," "[w]e had talked," "we had not figure (sic) out," "[w]e had never before discussed," "[w]e decided," "we had to do something. . . . " *Id.*, 476 U.S. at 534-35. Thomas admitted being the one who physically murdered the petitioner's aunt. *Id.*

By contrast, in the instant case, Harris's post-arrest statements did not admit jointly planning or executing a narcotics trafficking operation. Moreover, it can hardly be said that the references to Williamson were "integral" to the self-incriminating portions of Harris's statements. The references to Harris are more accurately described as incidental. Harris's first reference to Williamson (according to agent Walton) was in the context of his statement that he had obtained the cocaine from an unidentified Cuban individual in Ft. Lauderdale. Harris, apparently, added that "the acquisition for (sic) the cocaine had been made by Fredel Williamson of Atlanta. . . . " J.A. 37. Harris further claimed that the cocaine belonged to Williamson. *Id.* In his next statement, Harris explained that he had included Williamson's name on the automobile rental contract because "Mr. Williamson was going to be in Ft. Lauderdale," apparently the location where the vehicle was rented. J.A. 38-39. The next reference was simply that the unidentified Cuban male from whom he

claimed to have procured the cocaine was "an acquaintance of Fredel Williamson. . . . " *Id.* The final reference was that the cocaine was intended to be delivered to him in Atlanta but that a delivery would be impossible because Williamson, who Harris now claimed had been travelling in front of him at the time he was arrested, observed the stop and his trunk being searched. J.A. 40.[5] Thus, the portions of Harris's statements incriminating Williamson are hardly integral to those portions of the statements marginally incriminating Harris. They were certainly not made in the first person plural voice as were the statements in *Lee*. This clearly was not a case where Harris could not accurately describe his role in the criminal venture without identifying Williamson (or anyone else). Gov.Br. 24.

## III. A POST-ARREST CONFESSION OF AN ALLEGED ACCOMPLICE WHICH INCRIMINATES A CRIMINAL DEFENDANT DOES NOT FALL WITHIN A FIRMLY ROOTED HEARSAY EXCEPTION.

The government labors to establish that statements admitted as declarations against penal interest satisfy the

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[5] In Harris's final and most damning statement about Williamson, he said nothing so incriminating of even himself that a reasonable person would not have made the statement unless believing it to be true. In this passage, which primarily concerns the activities of Williamson, Harris merely repeats that he was delivering the cocaine to Atlanta. J.A. 40. However, Harris had twice previously made this statement. He had nothing to lose by repeating it a third time. Thus, even if the government were permitted to bootstrap the admissibility of inculpating a defendant (and arguably self-serving to the accomplice) to those portions of an accomplice's statement incriminating the accomplice, the portions of Harris's statement incriminating Williamson in this passage would be inadmissible.



Confrontation Clause because they fall within a "firmly rooted" hearsay exception. Gov.Br. 24-34. Its efforts, however, are misdirected. As the majority of this Court unequivocally declared in *Lee v. Illinois*, 476 U.S. 530 (1986), statements such as those of Harris against Williamson cannot meaningfully be categorized as declarations against penal interest. *Id.* at 544 n.5. Instead, this case, as *Lee*, must be decided "as involving a confession by an accomplice which incriminates a criminal defendant." *Id.* None of the factual distinctions which the government urges between the statements in *Lee* and those in the instant case alter this core identity between the nature of the statements. The government has not cited, nor can Petitioner find, a single case holding that custodial confessions by an accomplice which incriminate a criminal defendant constitute a firmly rooted hearsay exception. These statements are universally condemned as uniquely and especially suspect. They present grave danger to the reliability of the factfinding process. They utterly fail to meet any of the criteria for a firmly rooted hearsay exception.

Even assuming the relevant category were "declarations against penal interest," the government's argument does not establish it as a firmly rooted exception. The government first argues that this exception is firmly rooted because it is found in the Federal Rules of Evidence. Gov.Br. 26. Inclusion in the Federal Rules of Evidence does not make an exception firmly rooted. In *Idaho v. Wright*, 497 U.S. 805 (1990), this Court rejected the petitioner's argument that the residual hearsay exception, codified in the Federal Rules of Evidence and the Idaho Rules of Evidence at 803(24), is firmly rooted. *Id.*, 110 S.Ct. at 3147. This Court noted that were it to take that position, "virtually every codified hearsay exception would assume constitutional stature, a step this Court has repeatedly declined to take." *Id.* at 3148 (citations omitted).

Nor is it determinative that "a majority of the states have adopted statutes or rules identical or substantially similar to Rule 804(b)(3). . . . " Gov.Br. 26. Regardless of the number of states that may have embraced, for instance, the residual hearsay exception, this would not have converted it into a firmly rooted exception. Moreover, simply stringing out the number of states which have adopted hearsay exceptions similar to Rule 804(b)(3) does not fairly or accurately reflect what judicial or legislative imprimatur has been placed upon the statements which arguably fall within this exception. As the government acknowledges, several states have found statements of an accomplice implicating a defendant so untrustworthy to warrant legislatively banning them from their courts. Gov.Br. 27 n.15. Additionally, notwithstanding general rules permitting introduction of statements against penal interest, several other states have judicially declared these statements inadmissible. *Id.*; Pet.Br. at 20 n.5. This substantial and continuing consensus that these statements are unreliable and their admission violates constitutional rights belies any notion that the declaration against penal interest exception is firmly rooted.[6]

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[6] The government claims that "most of the courts of appeals to have considered the issue have held that the hearsay exception for statements against penal interest is 'firmly rooted.' " Gov.Br. 28 and n.17. Petitioner has previously explained most of these rulings. Pet.Br. 20-22. Regarding *Berrisford v. Wood*, 826 F.2d 747, 751 (8th Cir. 1987), *cert. denied*, 484 U.S. 1016 (1988), it does not appear that this issue was even argued and any error in admitting the statement was determined to be harmless. *Id.* at 752. The opinion fails to discuss prior circuit precedent. Its conclusion that the declaration against penal interest exception is firmly rooted contradicts prior circuit caselaw. *See, e.g., Olson v. Greene*, 668 F.2d 421, 427-28 and n.11 (8th Cir.)("custodial statements implicating a third person do not fall within a firmly rooted hearsay exception"), *cert. denied*, 456 U.S. 1009 (1982); *United States v. Riley*, 657 F.2d 1377, 1381-86 (8th Cir. 1981)("admissibility of collateral inculpatory declarations against penal interest under Fed.R.Evid. 804(b)(3) presents a controversial and complex evidentiary problem"), *cert. denied*, 459 U.S. 111 (1983); *United States v. Love*, 592 F.2d 1022, 1025-26 (8th Cir. 1979); *United States v. Lilley*, 581 F.2d 182, 187-88 (8th Cir. 1978).



In an effort to increase the historical duration of the declaration against penal interest exception, the government has endeavored to replant its root. Gov.Br. 29-33. The government acknowledges, as it must, that the leading decision in England, *Sussex Peerage Case*, 11 Cl. & F.85, 8 Eng.Rep. 1034 (1844), held that statements against penal interest were inadmissible. It likewise acknowledges that this Court, in *Donnelly v. United States*, 228 U.S. 243 (1913), followed the rule of the *Sussex Peerage Case* and held that statements against penal interest, unlike statements against pecuniary or proprietary interests, were inadmissible. Relying on the criticism of Wigmore and other "commentators" of the *Sussex Peerage Case* and *Donnelly*, the government essentially urges this Court to ignore the brevity of this exception's history and treat it, instead, as if the cases which rejected the exception, embraced it. The government's quest at historical revisionism must fail. Even if the criticisms upon which the government relies were valid, the question posed by this aspect of the inquiry, whether the declaration against penal interest exception reflects a long standing tradition, cannot be answered by the response to the question, whether it *should have been* part of a long standing tradition.

In its argument that this Court's retreat from *Donnelly* came before the 1976 adoption of the Federal Rules of Evidence, the government has failed to acknowledge *Chambers v. Mississippi*, 410 U.S. 284 (1973). There this Court observed that traditionally, and at the time, statements against penal interest were not included within the

declaration against interest exception. *Id.* at 299-300, 93 S.Ct. at 1047-48.[7]

The government's attempt to distinguish the class of hearsay statements criticized as "too large" for meaningful constitutional analysis in *Lee v. Illinois*, 476 U.S. 530, 544 n.5 from the hearsay exception under Federal Rule of Evidence 804(b)(3) is ineffective. Federal Rule of Evidence 804(b)(3), which evolved from the common law and specifically expressed an objective "reasonable person" standard, had been around for nearly ten years when *Lee* was decided. This Court's reference to the declaration against penal interest exception certainly contemplated this prevailing understanding of the exception. It rejected the

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[7] The government's attempt to bypass *Douglas v. Alabama*, 380 U.S. 415 (1965), and *Bruton v. United States*, 391 U.S. 123 (1968), Gov.Br. 32 n.21, cases that presumed the inadmissibility of inculpatory confessions of codefendants, is also unprincipled. It claims that "the out-of-court statement in *Douglas* was not against the declarant's penal interest because it sought to establish his co-defendant as the trigger man in a shooting." *Id.* To the contrary, declarant Lloyd's statement, which admitted that he and Douglas intended to shoot the victims and that he drove the vehicle while Douglas shot at the victims' vehicle, *id.*, 380 U.S. at 417 n.3, unquestionably was against Lloyd's penal interest and substantiated his charge of assault with intent to murder. Regarding *Bruton*, were the declarations against penal interest exception firmly rooted and, thus, the confrontation rights of the defendant unaffected, this Court would have had no reason to concern itself with the efficacy of the jury instruction to ignore the hearsay statement. To the contrary, the Court in *Bruton* declared that the declarant's inculpatory hearsay statement "was clearly inadmissible against [the defendant] under traditional rules of evidence" and indicated that there were no recognized exceptions to the hearsay rule applicable to the defendant's accomplice's confession. *Id.* at 128 n.3. *Accord Cruz v. New York*, 481 U.S. 186, 189-90 (1987)(where two or more defendants are tried jointly, the pretrial confession of one nontestifying defendant is inadmissible against the others).



notion that this exception was firmly rooted. To the extent that there is any material distinction between the common law hearsay exception and Rule 804(b)(3), the distinction would further demonstrate that the exception as presently contemplated by the Federal Rules of Evidence is not firmly rooted.

If the relevant category for analysis is "statements against penal interest," it does not constitute a firmly rooted exception because it does not "rest upon such solid foundations that admission of virtually *any* evidence within [it] comports with the 'substance of constitutional protection.' " *Ohio v. Roberts*, 448 U.S. 56, 66 (1980)(citation omitted)(emphasis added). This exception encompasses a wide variety of hearsay statements including ones that exculpate and inculpate the defendant. These statements are made under innumerable circumstances bearing differently on their trustworthiness. Thus, this exception is similar to the residual hearsay exception which, though contemplating statements with certain common elements tending to indicate trustworthiness, accommodates ad hoc instances which neither categorically nor universally provide reasonable guarantees of trustworthiness. *Wright*, 110 S.Ct. at 3147. Like the residual hearsay exception, the declaration against penal interest exception is not firmly rooted.

The "substance of constitutional protection" implicates, at least, all of the functional goals underlying the Confrontation Clause – ensuring a statement under oath; forcing the declarant to submit to cross-examination, "the greatest legal engine ever invented for the discovery of truth"; and permitting the jury determining the defendant's fate to observe the witness's demeanor in assessing his credibility. Petitioner submits that, regarding custodial confessions by an accomplice which incriminate a defendant, a defendant can *never* secure this protection absent cross-examination of the declarant. However, at the very least, categorically admitting, *inter alia*, the

unsworn, presumptively untrustworthy custodial statements of a defendant's alleged accomplice, without forcing the accomplice to submit to cross-examination, fails to meet these goals. A court's speculation that the declarant spoke from a trustworthy state of mind fails to provide the functional equivalence of this constitutional protection. For this reason, too, this exception is not firmly rooted.

Respectfully submitted,

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